No. 8809

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOE MAZUROSKY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

Upon Appeal from the United States District Court
for the District of Oregon

REPLY BRIEF OF APPELLANT

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FOREWORD

Under the rule of this court, the reply brief may contain but 20 pages, exclusive of the appendix. This has necessitated placement in the appendix of one section of the material otherwise intended for the main body of the brief. The material referred to is found at pages 22 to 28 inclusive, of the appendix. We do not mean by such devious means to subvert the operation of the rule, but appellate courts do make some con-

cession in criminal cases where a man's life and liberty are substantially at stake. We trust the Court will indulge us in this chosen course. The material referred to is in reply to the discussion found at pages 3 to 8 inclusive of appellee's brief. It should be read in the interest of a complete understanding of certain salient portions of the record, and to correct a series of inferences drawn by the government attorneys, which we respectfully contend are not in the least warranted by the facts of the case.

Reply to Point I of Appellee's Brief

Argument of this point is found beginning at page 14 of appellee's brief. We have no quarrel with the proposition there contended for. If a party knowingly joins a conspiracy, he may not excuse himself by saying that his function in the operation of the conspiracy was but nominal. But he must join with knowledge of the conspiracy.

Reply to Point II of Appelle's Brief

The argument on this point is found beginning at page 17 of appellee's brief. It is made in response to the point presented by appellant beginning at page 28 of the appendix of this brief. By an inadvertance, the copy on this point did not get to the printer when appellant's brief was being printed. The copy was furnished counsel, however, and the argument under this point is in answer thereto.

We can add little to our affirmative presentation of this question, noted in the appendix. We urge that the Belter check was collected and the cash received before the Exhibit 11 was transmitted and that, therefore, the acts charged in Count 4 were not in furtherance of the fraudulent scheme.

Reply to Point III of Appellee's Brief

Argument on this point is found beginning at page 20 of appellee's brief. The contention is that the substantive offense under Sec. 338 of Title 18, U. S. C. A., may be committed without a prior intent.

Counsel apparently have misconceived the whole theory of the prosecution on the substantive counts of the indictment. The rule is that it need not be proven under this section that it was a part of the fraudulent scheme that the mails should be used in its execution. Proof that the mails were used is sufficient. But, to commit the offense chargeable under the sub-division of Sec. 338 upon which Count 4 is predicated, the accused must "knowingly cause to be delivered by mail" the particular item which it is claimed resulted in the prostitution of the mails. The cases cited by counsel clearly draw the distinction. In the Silkworth case, cited at page 20 of appellee's brief, it is noted that it is not necessary to prove that "*at the time the parties entered into the common scheme*" they intended to use the mails. That is the undoubted law as we pointed out at pages 44 and 45 of appellant's brief. It is nevertheless true, that while the scheme itself need not

embrace the mails, the accused in performing the act under the substantive count must "knowingly cause to be delivered by mail," the document which it is claimed perverts the facilities of the postal establishment.

Perhaps it was the failure of the prosecuting officials to observe this clear mandate of the statute which accounts for the paucity, if indeed not the total lack of any evidence, to show that the appellant knowingly caused the mailing and delivery of the draft, Exhibit 11, by the Kennewick bank, as charged in Count 4 of the indictment.

Reply to the Arguments Contained on Pages 11 and 12 of Appellee's Brief

This pertains to Count 4 of the indictment and to the discussion contained in appellant's brief beginning at page 23 and ending at page 39. Counsel summarily dismiss the whole subject by suggesting, (1) that the Bank of Kennewick used the mails at the "specific request" of the appellant and that appellant specifically requested that the remittance be made in Portland exchange, and, (2) that it need not be shown that the appellant had a "prior intent" that the mails should be used by the Bank of Kennewick in making the remittance. The point under subdivision (2) is considered beginning at page 3 of this brief, in response to the identical argument made under point III of appellee's brief, beginning at page 20 thereof. We refer now to the record itself to show that appellant did not make

a specific or any other kind of a request that the mails be used or that the remittance should be made in Portland exchange.

Counsel do not state where in the record this "specific request" was made, and after diligent search we are unable to find it. The only request made by the defendant, as shown by the record, was that a "no protest" stamp be placed "on the face of the check" (R. 109), and that the check be sent "direct" to the bank. This special request was not made when the check was subsequently sent through *for collection,* but at the time the check was deposited by defendant in his savings account. The Court will recall that the check was returned unpaid by the Kennewick bank after it had been forwarded by the Bank of California the first time. It was on this occasion that the special instructions were given by appellant and these instructions were limited to the "no protest" stamp and to the request that the check be sent "direct" to the bank. When the check was returned to the Bank of California, the defendant was notified that it had not been paid, and thereupon he accepted return of the check, and the bank charged his savings account in the sum of $500.00. (R. 110.) The appellant thereupon took the check to the collection department of the bank and sent it through for collection. Upon being sent through for collection, the check was accompanied by the triplicate form which is Government Exhibit 9. Three witnesses testified in respect to this exhibit. E. F. Munley iden-

tified Exhibit 9 as "a record of our bank concerning the Belter check"; "we call this record a collection register." (R. 107.) The witness Allen simply testified: "I have looked at 'triplicate form No. 9'." And the third witness, J. L. Bliss, simply noted that Exhibit 9 accompanied the check when it was sent through for collection, and that he made some notation in his own handwriting. (R. 116.) The witness Bliss was identified with the First National Bank of Kennewick. By reference to the original Exhibit No. 9, it will be seen that the only handwriting on the exhibit is that of the initial "J," that being the initial of the witness J. D. Bliss which was placed thereon by him as he testified.

Now we ask counsel, where in the record is it shown that appellant "specifically requested" that remittance should be made in Portland exchange? No witness from the Bank of California or from any other quarter testified that the appellant instructed that the remittance should be made in Portland exchange. The fact that the Bank of California did make this notation on the collection register, Exhibit 9, does not carry the inference that the defendant "specifically requested" that it be placed there. The term "Portland exchange" is a banking term of which the defendant had doubtless never heard. We find the same situation here as the Supreme Court found in the Malloy case, noted at pages 31 to 35 of appellant's brief.

Counsel further contend in this same connection that appellant acknowledged in open court the custom-

ary usage and course of business of the Bank of Kennewick and all other banks with which he was doing business. (App. Br. pp. 11, 12.) By this statement, counsel must have referred to the stipulation found on page 128 of the record.

It is the only admission we can find even remotely touching on counsel's conclusion. The stipulation, of course, speaks for itself. It was simply stipulated that the draft, Exhibit 11, was forwarded by the Kennewick bank to the Bank of California, and that it was the custom and practice and ordinary course of business to transmit such items as drafts by sending them through the mails. The stipulation does not recite that it was the custom and practice and ordinary course of business for the bank to remit funds collected by it by a draft drawn upon a correspondent bank. The provision of the stipulation was that the bank did forward its draft and that when it had occasion to so forward a draft, it used the United States mails as the means of forwarding such items. The Court will judicially notice that it is not the custom and practice and ordinary course of business for any bank to remit an item collected by it by means of its own draft. *Federal Reserve Bank of Richmond v. Malloy et al.,* 264 U. S. 160, 44 Sup. Ct. Rep. 296, 68 L. Ed. 617; *Jennings v. United States Fidelity and Guaranty Co.,* 294 U. S. 216, 55 Sup. Ct. Rep. 394, 79 L. Ed. 869 (1935). In the case of *Capital Grain & Feed Co. v. Fed. Res. Bank,* 3 F. (2) 614, 616 (D. C. Ga.), it was held that a statute of a state authorizing

remittance of a collected item to be made by an exchange draft, was unconstitutional and void, as being in derogation of the express terms of the order appearing upon the face of the check.

We direct attention at this point to an erroneous statement made at page 35 of appellant's brief. It is there stated that it was not shown that there was an understanding between the banks defining the terms of the remittanc. It is true, as we have shown, that the Bank of California did note a special instruction that remittance should be made by Portland exchange.

It is respectfully submitted, subject to the correction just noted, that the authorities and discussion presented at pages 26 to 36 inclusive of appellant's opening brief are controlling on this particular point, and that by reason thereof the conviction should not stand as to Count 4 of the indictment.

Intent to Use the Mails; Counts VII and VIII

At pages 12 and 13 of appellee's brief, is contained response to the argument of appellant appearing at pages 40 to 46 inclusive of appellant's brief on the proposition that there is no substantial evidence to show that it was a part of the agreement comprising the conspiracy that the U. S. mails should be used in executing it.

The argument is that because the appellant in 1933 (the record shows 1934, R. 142) instructed the U. S. National Bank of Portland to airmail a draft; because

he was a business man of long experience and because the "swindlers" sent checks to defendant from distant points to be placed through legitimate banking channels for collection, and because the checks could not be cashed at the banks in the vicinity of the criminal operation, sufficient proof of intent to use the mails is made out.

The facts as thus stated are grossly garbled. Gray testified that between 1930 and 1935 the Martin-Gray gang of conspirators had defrauded "probably a thousand" persons in execution of the eye frauds. (R. 98.) Only in two of these transactions, one out of every 500, was it shown that the mails were used. The record shows that in each instance the conspirators endeavored to obtain the money and cash the check at the particular point where the fraud was perpetrated. (R. 57, Wagner; R. 55, Belter). The Deibert check was post-dated, and, therefore, could not be cashed at the time; the conspirators in this instance did, however, go to the bank with Mr. Deibert to get the money and he didn't have it; hence the post-dated check. The conspirators likewise went with Mr. Belter to his bank to obtain the money (R. 55). The record does not show whether the conspirators attempted to cash the Mershon check at the bank on which it was drawn (R. 86). In the Allen transaction, Miss Allen did not have the money in the bank, but the conspirators accompanied her to the bank to get the money (R. 93). From the foregoing evidence we are unable to join in the conclusion that the

"checks . . . could not be cashed at the banks in the vicinity of their criminal operations." The proof shows quite to the contrary, and the only reason these particular checks were not cashed on the ground was because the parties did not have the money in the bank. In the absence of proof to the contrary, it may be assumed that the other 998 checks received by the Martin-Gray group were cashed right at the time the checks were received. The record shows such a course to have been their modus operandum.

It is again reiterated that the proof received in the case brings this case squarely and unequivocally within the rule of the Farmer and Schwartzberg cases, supra (App. Br. pp. 40 to 46 inclusive), and that there is an absence of any evidence sufficient to show that it was a part of the agreement comprising the conspiracy that the U. S. mails should be used in executing it.

Reply to Points IV and V of Appellee's Brief

Points IV and V of the brief of appellee are apparenly directed to a justification of the testimony relating to the Wagner transaction and to appellant's Brief, pages 59 to 64, inclusive.

No attempt is made to answer the arguments appearing in appellant's affirmative presentation of this subject. Instead, counsel quote a few cases, all without any reference to the facts of this case, and conclude generally that because the courts have given some discretion to the trial court, and because some latitude has

been given in the proof of conspiracies, the proof here was acceptible.

It will be observed that counsel do not make a claim for this testimony that it tended to show that appellant was a party to the conspiracy of Brown and Nelson which existed in 1925. The record clearly shows that not to have been the fact (App. Br. 59 to 64), and apparently this point is conceded. We are then confronted with the rule which has never been questioned in any court, that to be admissible in evidence the acts of a co-conspirator must be done while the conspiracy is pending and in furtherance of its object. That acts of a co-conspirator prior to the formation f the particular conspiracy charged in the indictment, may not be received in evidence; that evidence of disconnected smaller conspiracies directed to the same end as that defined in the general conspiracy charged in the indictment, will not be received, even though there may be an identity as to some of the parties in the two conspiracies. See *Terry v. U. S.*, 7 F. (2d) 28 (C. C. A. 9) and cases cited at pages 63, 64, App. Br.

The theory apparently is that though this testimony was inadmissible on the above grounds, it was admissible on others which counsel assign, to wit: To show knowledge and to show the relationship of the various parties. Such are the theories on which counsel offered this evidence at the trial (R. 53).

The evidence then must be tested on each of the grounds assigned to determine its admissibility.

The rules of evidence governing Federal Courts in criminal cases arising in the State of Oregon, are those which the local courts adopted in their usual daily practice when Oregon was admitted into the Union. *Louie Ding v. U. S.,* 247 F. 12, 15 (C. C. A. 9th); *Neal v. U. S.,* 1 F. (2d) 637 (C C. A. 8); *Coulston v. U. S.,* 51 F. (2d) 178 (C. C. A. 10). We look then to the rule as established in Oregon in 1859, as evidenced by the decisions of the Oregon Supreme Court.

Attention is directed to the case of *State v. Smith,* 55 Ore. 408, 106 Pac. 797. At page 416 of the opinion, is found the following rule:

> "It is generally conceded that where the proof tended to show that the accused party and his associate had conspired to do an unlawful act, evidence of other transactions in furtherance of the common enterprise is relevant. Elliott, Ev. No. 2939." . . . *"that in all other instances the admission of evidence of substantive offenses is the same in cases of conspiracy as in crimes committed by only one person, and in support of this deduction reference will be made to a few cases of the latter class."*

The Wagner transaction was "another offense" under the definition and since no claim is made that defendant was a party to the conspiracy in 1925, then the rules generally applying to the admissibility of other offenses, in substantive crimes, apply here.

The Rule in Oregon

The Oregon rule is exhaustively discussed by Justice Burnett in the leading case in this state, *State v. Wilson,* 113 Ore. 450, 233 Pac. 259, wherein the learned

justice reviews the early cases as well as the later ones in defining the rule. We quote from the opinion, at pp. 30, 31 of the appendix of this brief, to which reference is made.

Before applying the rules as thus enunciated, a distinction should here be noted. The testimony relating to the Wagner transaction which occurred in 1925 consisted of (a) acts performed by the conspirators Brown and Nelson out of the presence of the defendant, in connection with a conspiracy in which appellant was not a party, and (b) statements made by the witness Wagner to the appellant by which he was informed that the conspirators Brown and Nelson had defrauded Wagner. (R. 83; App. Br. pp. 9 to 13, inc.)

Since the testimony under classification (a) relates exclusively to a fraud perpetrated by Nelson and Brown, it is difficult to see how those acts can have any relevancy as to appellent. Under none of the rules permitting reception of testimony of other offenses, will a category be found into which this line of proof may be placed. The appellant may not be convicted upon testimony concerning the wickedness of others. Since he was not there, such proof cannot serve to show the "evidence of relationship" which counsel claim for it; since the appellant was not there, it cannot show the "knowledge" which counsel claim for it. For such testimony to be admissible it must be shown that the party who is on trial committed the other offense, thereby connecting the state of mind of the accused in the for-

mer offense, with that of his subsequent act. The Supreme Court, in the case of *State v. Wilson,* supra, expresses the thought in the following language (113 Ore. 450, 498):

> "No defendant ought to be deprived of his liberty by hue and cry or by the mob-yell of 'Crucify him,' but only upon an indictment constitutionally framed and proven *by evidence of criminal acts, a connection between which 'must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish.'*"

Thus, about one-third of the entire record, practically the whole of the testimony relating to the Wagner transaction, was admitted upon theories which were both obviously unsound and in flagrant violation of indisputible rules of evidence to which we have referred here and in the opening brief.

(b) The testimony given by the witness Wagner to the effect that he told the appellant of the fraud that had been perpetrated upon him is a horse of a different color. This testimony can have no relationship to the mass of the evidence concerning acts done by Nelson and Brown, unbeknown to appellant. This evidence would serve to show knowledge to the extent of the exact statements made to appellant by the witness. This particular bit of the evidence, which took up about one minute of the trial, would be admissible to show knowledge of the conspiracy which existed in 1925, and would be relevant were it not so remote in time and if it were not for the further fact that such statements referred

to another conspiracy altogether. The two phases of the proof are objectionable on entirely distinct and separate grounds, and each are prejudicial for different reasons, as we have endeavored to show.

Counsel suggest the transaction was not too remote in time to be of evidential value, and cite *Ketterback v. U. S.*, of this circuit, 202 F. 377 (Appellee's Br. p. 23), in support of this conclusion. We cited the foregoing case at page 62 of appellant's brief to clearly distinguish the facts of the instant case from those shown in that decision. In the Ketterback case there was a *series of transactions* extending back seven years—all leading from one act in an extensive chain to another, year by year, right up to the act charged in the indictment. The evidence there was of the most convincing sort and was clearly admissible. Here, however, we have a single, isolated transaction extending back ten years—*with a lapse of ten years* between the time the transaction was completed, and the time another of the checks was taken, with the further fact irrefutably appearing that the party here sought to be charged was not a party to the fraudulent conspiracy then in process.

The Rule in the Ninth Circuit

This court has heretofore condemned in strong language an attempt by prosecutors to convict an accused upon testimony of the character mentioned in the assignments. We have heretofore and in the opening brief

discussed the Terry case. (App. Br. p. 63.) We conclude this phase of the discussion by quoting from the opinion of Garrecht, C. J., in *MacLafferty v. U. S.*, 77 F. (2d) 715 (C. C. A. 9):

> "We hold that before the evidence in relation to these prescriptions other than the ones described in the indictment could be admittd in evidence it was necessary for the government to show that such other prescriptions or sales were connected with actual violations of the law. The rule to be applied in such cases is set forth in *Coulston v. United States,* (C. C. A. 10) 51 F. (2d) 178, at page 180, cited by appellee, where the court speaks as follows: 'In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. *Boyd v. United States,* 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; *Hall v. United States,* 150 U. S. 76, 14 S. Ct. 22, 37 L. Ed. 1003; *Niederluecke v. United States,* (C. C. A. 8) 21 F. (2d) 511; *Cucchia v. United States,* (C. C. A. 5) 17 F. (2d) 86; *Smith v. United States,* (C. C. A. 9) 10 F. 787; Wigmore on Evidence, (2d Ed.) Sec. 194. Corpus Juris cites cases from forty-four American jurisdictions in support of this rule. 16 C. J. 586. There are many exceptions to the rule, the most common of which is that, if the prosecution must show a specific intent, evidence of other similar offenses may be used to establish that fact."

"The particular exceptions here under discussion are noted in *Paris v. Unoted States,* (C. C. A. 8) 260 F. 529, at page 531, where the court, after citing some of the authorities set forth above, declared: '. . . To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, *proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial,* may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. *In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible.*"

See also *Marshall v. U. S.,* 197 F. 511 (2d), digested at page 32 of the appendix of this brief. Also *Smith v. U. S.,* 10 F. (2d) 787 (C. C. A. 9th).

CONCLUSION

Since the organization of the Federal Judicial System, the United States Courts have applied the rule that before a man may be taken from his family, deprived of his liberty and be branded "felon," he must be fairly convicted upon legal evidence, and upon substantial evidence. We have attempted herein to show that the large bulk of the evidence upon which this appellant was tried, related to matters with which he was admittedly not concerned, and which were not mentioned in the indictment. The prosecuting officials

counter by stating, at page 25 of the answering brief, that even if this was error, the error was not prejudicial. If that be true, and if the government did not rely heavily upon the testimony covering the incident in 1925 to convict this appellant, then why was so much of the case devoted to it? This is not a fair, consistent or frank position for counsel to assume.

As respects the testimony relating to Count 7, counsel have not undertaken to suggest to the Court how any of it was admissible, in the face of the Kuhn and Mayola cases of this circuit, cited at pp. 66-67 of appellant's brief. The questions presented in the brief of appellant, with nominal exception, were not extended the courtesy of a passing glance.

We have contended throughout the case that the record was and is devoid of substantial evidence. A concise definition of "substantial evidence" is found in the recent pronouncement of the 10th Circuit in the following language:

> "Because there is no substantial evidence of a violation, the court should have directed a verdict of acquittal. Some evidence has been presented, but it is not substantial. The law requires more than merely 'some' evidence; it demands that the verdict be based on substantial evidence or a conviction will not be permitted to stand. In this case all the substantial evidence is as consistent with innocence as with guilt." *Towbin v. U. S.*, 93 F. (2d) (C. C. A. 10) 861, 866.

Juries are not permitted in civil cases to speculate on the negligence of a defendant. They should not be

permitted to guess at the guilt of a defendant in a criminal case. *Leslie v. U. S.*, 43 F.(2d) 288, 290 (10th).

The evidence shows that the appellant was operating a pawnshop and a second-hand store. In making loans upon articles pledged with him, he was, by the very nature of the business, taking chances upon the ownership of the articles so pledged. The police might at any time reclaim the pledged article. In recognition of this fact, the laws regulating such lines of business allow high rates of interest to be charged. So it was with the checks which the appellant would cash, not only for Nelson and his ilk, but for other of his customers. If the charge he made for this service was unconscionable, it was not more so than the rates of interest pawn brokers are customarily allowed in their business transactions. Nelson made many loans from appellant, and from the fact that they were made from time to time, it may be fairly inferred that Nelson repaid the loans when due. He might have known that Nelson was not in the clear, but aside from the incident which occurred in 1925, the record shows nothing whatsoever that would lead him to such a conclusion. Though he knew Nelson well, the latter had not only failed to tell him, but had carefully concealed the fraudulent scheme from him. Nelson testified:

"No, sir. I don't think I ever discussed it with Mazurosky";

"I don't really think we ever did discuss it";

"I don't remember having any conversation with him in that regard."

All of the frauds were perpetrated at points distant from the state of Oregon. Appellant was admittedly not sharing in the profits of the scheme. Of all the frauds perpetrated by Nelson over the eleven-year period, only two checks, both regular upon their face, were turned over to appellant. These are in addition to the Wagner check of 1925. Of the thousand frauds perpetrated by the Martin group, but two of the checks found their way to the appellant. The remark about the "suckers" was clearly in jest. The vernacular "sucker lists" are not composed only of those who have been bilked in fraudulent schemes, but include, likewise, those who are oversold in legitimate business transactions. Nelson was an admitted gambler.

The record does not show that appellant knew or had basis for knowledge of what Nelson was doing, or whether he was engaged in various lines of endeavor. There is not the basis for an inference, after casting aside the presumption of innocence which shelters every defendant in a criminal case, that appellant knew or had reason to suppose that the checks were obtained in an illegal pursuit, and particularly in the fraudulent schemes charged in the indictment. If it be stated that this begs the whole question, then so be it. It is our sincere conviction, on the merits and upon the testimony received in the case.

Respectfully submitted,

EDWIN D. HICKS,

HICKS & ADAMS.

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APPENDIX

REPLY TO MISCELLANEOUS STATEMENTS AND INFERENCES DRAWN FROM THE EVIDENCE

(*See this brief, page 1.*)

In the answering brief, counsel for appellee have not questioned the accuracy of the summary of the evidence presented in appellant's brief beginning on page 7 and concluding on page 21 thereof. Statement is made, however, that the summary is "inadequate," and pages 3 to 8 inclusive are devoted to a disclosure of the particulars which counsel apparently feel warrant this conclusion. The testimony referred to and the inferences drawn therefrom will now be examined with specific reference to the record so the Court may see wherein the truth lies.

At page 4 of the brief we find this statement:

> "To show that appellant had knowledge of the unlawful means by which the co-schemer and conspirator, Frank Nelson, alias 'Slats,' obtained checks from victims, made out to fictitious persons and readily accepted by appellant Mazurosky, though he at that time knew the true name of the prior endorsees on the swindled check which is Government Exhibit 7."

It is submitted that that is a gross misconstruction of the record. Only on one occasion, and that was way back in 1925, did the defendant learn that "Slats" Nelson was operating under an assumed name. When

Mr. Wagner identified the Dr. Pierce as the party who had defrauded him, the defendant readily recognized from a description given, that Nelson had perpetrated the fraud under the assumed name. Nelson, thereupon, gave complete and accurate descriptions of both Brown and Nelson. (R. 70, 74, 75, 69.) As to the transactions mentioned in the indictment, and shown in the record, there is no evidence showing that the defendant knew that either Nelson as the spear-head of one of the conspiracies, or Martin (R. E. Terrell), of the other, were operating under fictitious names or that any other of the co-actors were operating under assumed names.

The defendant knew Martin under the name of R. E. Terrell and by no other name. He forwarded the two checks to the defendant under the name R. E. Terrell, and the defendant, without exception addressed Martin as R. E. Terrell. (R. 95, 149, 150.) The two checks (Mershon and Allen) were endorsed in blank and were as freely negotiable as a five-dollar bill. There is no evidence in the record to show that defendant knew that the names H. J. Pierce and O. C. Stone, appearing upon the Mershon check (R. 134), or that the name H. J. Miles appearing on the Allen check (R. 135) were fictitious names, or otherwise than endorsements entirely regular. Martin (known to the defendant as Terrell) had endorsed neither of the checks, nor was it necessary that he do so. Checks endorsed in blank are commonly negotiated without further endorsement. The same situation is found in respect to the two checks

received by the defendant from Nelson in the Belter and Diebert transactions. (R. 136-137.) Both checks were endorsed in blank "J. C. Adams," and it was never disclosed to the defendant that J. C. Adams was the assumed name under which Londergan was operating. The record fails to show that the defendant was acquainted with Londergan or with any other of the conspirators aside from Nelson. Nelson specifically testified that the defendant knew him only as Frank "Slats" Nelson, and there is no confusion in the record on that point. Frank Nelson was the true name of Nelson (R. 61), and the defendant knew him by that name and no other. (R. 65, 50, 51.) As far as the defendant knew, as shown by this record, the names Stone, Adams et al. were entirely regular and nothing has been found in the record to indicate a contrary conclusion. The two checks turned over to the defendant by Nelson were endorsed in blank and freely negotiable without the requirement of an endorsement by Nelson, and Nelson had endorsed neither. It is respectfully submitted that the record fails to bear out the inference drawn by counsel in the above quotation from the answering brief.

At page 6 of appellee's brief it is stated that appellant falsely stated to the detectives that the person from whom he received the check was a doctor. The record shows that this check was sent to the appellant by Martin (known to appellant as R. E. Terrell), and the record does not show that this party was not a

doctor. And the other three parties who were practicing the eye fraud, to wit, Nelson, Brown, and Gray, all were doctors of optometry, duly registered and qualified as such. (R. 97, 62, 50.) Brown was known as Dr. Brown, and optometrists are commonly styled as doctors. Since all who were practicing the eye frauds about whom we have specific information were optometrists (doctors), the inference may be not unfairly drawn that Terrell was likewise a doctor of optometry. Counsel cannot fairly conclude from the record that Terrell was not much.

Counsel also observe at this point that the officers told the appellant that the check had been obtained in a "bunco" game. The Court will observe from the record that the appellant handled no more checks for the Martin-Gray gang of conspirators after this information was given him.

At page 8 of the brief, counsel construe the testimony of the officers Powell and Williams (R. 77 to 80) as an admission by the appellant that he knew the "details" of the fraudulent schemes. A glance at the record will rebut this conclusion. What appellant told the officers was that the party from whom he received the check was known to him as "Slats", never as J. C. Adams. Nelson at no time operated under the assumed name of J. C. Adams. It was Londergan who used this name, and it was Londergan who endorsed both of the checks as "J. C. Adams." (R. 51, 59.) It is apparent from these conversations that the appellent was iden-

tifying Nelson. What he did tell them was that Slats "was" an eye specialist (an optometrist), and that "he worked with Dr. Brown about sixteen years ago in the eye specialist bunk as far as he knew" (R. 80), all of which was true as shown by the record except that it was ten years instead of sixteen years "ago." If counsel mean by their conclusion that the defendant thereby admitted that he knew Nelson was engaged in the "eye bunk" business in 1925, then we agree with the construction. But after that, Nelson had engaged in the hotel business for about a year, had been in the penitentiary a couple of times, had done some gambling, and after all this had occurred it could not be fairly inferred that because he was perpetrating a particular kind of fraud in 1925, he was up to the same trick ten years later. The reasonable assumption would be that after serving a term in the penitentiary for this offense (Rockford, Ill., 1930 R. 62) Nelson had learned his lesson, and that the theory of retributive justice, which forms the bulwark of our penal system, had operated to cleanse him.

At page 6 of appellee's brief, counsel note an admission "against interest" in the testimony of Mr. Keller, of the Western Union, upon the inquiry made by appellant concerning certain moneys transmitted by him by telegraph in 1934 and 1935. The names of the parties to whom the money was sent were not given, and therefore, nothing can be claimed for this testimony.

At page 8 of appellee's brief, counsel note that in presenting the Belter check to the Bank of California, the bank was instructed to "please hold for few days if necessary." We have searched the record carefully and can find no place therein where such an instruction was given by appellant. The Belter check had already gone to the bank once and had been returned. Under such a circumstance it would be expected that the bank in returning the check a second time, this time for collection, would request that it be held. It is then observed that Mr. Belter had told the "swindlers" that "the check would be good in a few days," and from this it is concluded that appellant was in communication with the criminals and was informed by them that the check would be good in a few days. This is a logical conclusion, though not a necessary one as we have attempted to show. We are, however, unable to conclude from this that the appellant was thereby informed that the check had been obtained in a fraudulent scheme. There is nothing in the record to show that the appellant knew Nelson to be a swindler in the eye racket in 1935. Nelson specifically testified, not once but several times, that he had never informed the appellant of the fraudulent scheme, and the forwarding of a bank check, regular upon its face, with instructions to hold for a few days, would not impart the essential information.

The remaining conclusions and the recitation of the testimony contained in the appellee's brief, have been

covered in our affirmative presentation in appellant's opening brief. We shall not duplicate the effort here except as need shall arise in answering specific arguments contained in other portions of the brief.

The transmission of the draft, Exhibit 11, from the First National Bank of Kennewick to the Bank of California, was not an act in execution of the fraudulent scheme alleged in Count 4 of the indictment.

(*See this brief, pages 2, 3 inclusive.*)

It was held by the 3rd Circuit in *Newingham v. U. S.*, 4 Fed. (2) 490 (C. C. A. 3), that after the victim has parted with his money, the execution of the fraudulent scheme is complete, and any acts done thereafter in respect to the transaction would not be in furtherance of the scheme to defraud.

We have endeavored to show that the act of transmitting the draft, Exhibit 11, by the First National Bank of Kennewick to the Bank of California was an independent banking transaction and that such act could not in any sense be considered the act of the defendant. (pp. 23 to 39 incl., Appellant's Br.)

It is submitted that the facts appearing in this record do not come within the perview of the rule announced in *Spear v. U. S.*, 246 Fed. 250 (C. C. A. 8) and *U. S. v. Kenofskey*, 243 U. S. 440, 37 Sup. Ct. 438, 61 L. Ed. 836, which hold in effect that the transaction

is not completed upon receipt of the check; that the act of forwarding the check *for collection* by the bank is an act in furtherance of the scheme, with the bank acting as agent for the accused.

Under the facts of this record, the collection had been made and the victim had already parted with his money before the draft, Exhibit 11, was transmitted to the Bank of California. The business of collection was at an end at the time the Kennewick Bank charged the account of the drawer with the check. *Jennings et al. v. United States Fidelity and Guaranty Company,* 294 U. S. 216, 55 Sup. Ct. 394, 79 L. Ed. 869 (1935). Any subsequent acts, even though connected with the transaction in its broad outlines, would not be in furtherance of a scheme to defraud. The indictment charges that the defendant, *for the purpose of executing said scheme and artifice to defraud* did unlawfully, Knowingly, willfully and feloniously place and caused to be placed in the United States mails at Kennewick the draft mentioned in Count 4 of the indictment. It is the contention of the defendant that the proof fails to support this allegation of the indictment and that, therefore, the conviction on this count must fail.

The doctrine to which reference is made has been applied in the following cases:

McNear v. U. S., 60 F. (2) 861 (C. C. A. 10).
Stewart v. U. S., 119 F. 89, 95 (C. C. A. 8).
Barnes v. U. S., 25 F. (2) 61 (C. C. A. 8).
Lonabaugh v. U. S., 179 F. 476, 481 (C. C. A. 8).
Merrill v. U. S., 95 F. (2) 669 (C. C. A. 9).

(*See this brief, pages 12, 13.*)

"The case of *State v. O'Donnell,* 36 Ore. 222 (61 Pac. 892), is a leading case in this state on the subject in hand. It has been cited often and has never been overruled. Here follows the statement of Mr. Justice Moore, of the so-called exceptions:

" 'The rule that evidence of crimes other than that charged in the indictment is inadmissible is subject to a few exceptions, speaking of which Mr. Underhill, in his valuable work on Criminal Evidence (section 87) says: "These exceptions are carefully limited and guarded by the courts, and their number should not be increased." The author gives five exceptions to such rule, which may be summarized as follows: (1) If several similar criminal acts are so connected by the prisoner, with respect to time and locality, that they form an inseparable transaction, and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan. . . Citing cases . . . Mr. Justice Agnew in *Shaffner v. Commonwealth,* 72 Pa. St. 60 (13 Am. Rep. 649), in commenting upon this exception, says: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish." (2) When the commission of the act charged in the indictment is practically admitted by the prisoner, who seeks to avoid criminal responsibility therefor by relying upon the lack of intent or want of guilty knowledge, evidence of the commission by him of similar independent offenses before or after that upon which he is being tried, and having no apparent connection therewith, is ad-

missible to prove such intent or knowledge, which has become the material issue for trial. . . Citing cases. . . Mr. Justice Rapallo, in *People v. Corbin,* 56 N. Y. 563 (15 Am. Rep. 427), in speaking of this exception, says: "The cases in which offenses other than those charged in the indictment may be proved, for the purpose of showing guilty knowledge or intent, are very few." (3) If the facts and circumstances tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or to conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial. . . Citing cases. . . When a crime has been committed by the use of a novel means or in a particular manner, evidence of the defendant's commission of similar offenses by th use of such means or in such manner is admissible against him, as tending to prove the identity of persons from the similarity of such means, or the peculiarity of the manner adopted by him. . . Citing cases. . . (5) When a prisoner is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties is admissible to prove an inclination to commit the act for which the accused is put upon his trial. . . Citing cases. . . "

(*See page 17 of this brief.*)

Marshall v. United States, 197 Fed. 511, 117 C. C. A. 65 (2d Cir.):

"On the trial of an indictment for using the mails to defraud in conducting the business of a society named in the indictment and alleged to be a fraudulent organization, the United States Circuit Court of Appeals for the Second Circuit held that it was error to admit testimony showing that the defendant was also at the same time conducting another socity of precisely the same kind by identical methods, which society was not mentioned in the indictment. The court said:

> " 'It is urged that the testimony was admissible upon the question of intent; but it is difficult to perceive how the repetition of identical facts can have any legitimate bearing upon this question. If the evidence as to the Standard Society showed a fraudulent intent, the government's case in that regard was established; nothing more was needed. If, on the other hand, it failed to show fraudulent intent, how was the omission supplied by duplicating the testimony under a different name? A lawful act does not become unlawful because it is repeated. If an act be shown to be illegal, it is enough. The prosecutor may safely rest on such proof; it doesn't add to its illegal character to show that it was repeated. If the contention of the government be correct, the acts of the defendant in relation to the Banker's Company constitute an offense under section 5480 and he had a right to rely upon the rule that he would not be called upon to answer accusations not found in the indictment. It is impossible to say how much of this evidence may be prejudiced the jury.' "

(*See page 17 of this brief.*)

Smith v. United States, 10 F. (2d) 787 (C. C. A. 9th):

"The effect of the admission of the testimony so complained of was to show or tend to show against the accused the commission of crimes independent of that for which he was on trial. With certain exceptions not applicable here, it is the well-settled rule that this cannot be done. *Boyd v. United States,* 12 S. Ct. 292, 142 U. S. 450, 35 L. Ed. 1077; *Newman v. United States,* (C. C. A.) 289 F. 712. In *People v. Molineux,* the court said: 'This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Carta?'

"The judgment is reversed, and the cause is remanded for a new trial."